UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

BLAKE SETTLES, as Personal Representative of the Estate of Daniel Freeman,	)	
Plaintiff,	)	
v.	)	**CAUSE NO. 1:03-CV-306**
JAMES A. HERMAN, in his official capacity as Sheriff of Allen County,	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

Plaintiff Blake Settles ("Settles"), in his capacity as personal representative of Daniel Freeman's ("Freeman") estate, brought this suit against Defendant Allen County Sheriff James A. Herman ("Sheriff Herman" or "the Sheriff") after Freeman died while incarcerated in the Allen County Lockup. Settles states two claims: (1) a 42 U.S.C. § 1983 claim for violation of Freeman's Fourteenth Amendment rights; and (2) a wrongful-death claim for negligence under Indiana law. In a previous order, this Court denied Sheriff Herman's motion for summary judgment on Settles's § 1983 claim. For the reasons given below, the Court now GRANTS Sheriff Herman's motion for summary judgment on Settles's wrongful-death claim.

The facts of this case were recited at length in the Court's previous order (Docket # 46), and thus a brief summary will suffice here. When Freeman arrived at the Lockup on August 15, 2001, Lockup personnel decided that he was too intoxicated to be processed or to undergo receiving screening. Pursuant to the Sheriff's policies, Freeman was placed in a holding cell to "sleep it off," and officers checked on him periodically to see if he was sufficiently sober to be

processed. One of these checks found Freeman unconscious and without a pulse, and he was transported to a hospital, where he was pronounced dead. Dr. Scott A. Wagner, M.D., a board certified forensic pathologist, performed an autopsy and concluded that Freeman died from "acute alcohol toxicity and hypoglycemia."[1] (Aff. of Scott Wagner ¶¶ 4, 10.)[2] Dr. Wagner also concluded that "a contributing factor to Mr. Freeman's death was a toxic level of Oxycodone," a painkilling medication. (*Id.* ¶ 10.) Freeman's blood-alcohol level was .378% at the time of his death. (*Id.*, Ex. 8B at 1.)

Summary judgment may be granted only if there are no disputed genuine issues of material fact. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). When ruling on a motion for summary judgment, a court "may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." *Id.* The only task in ruling on a motion for summary judgment is "to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). If the evidence is such that a reasonable factfinder could return a verdict in favor of the nonmoving party, summary judgment may not be granted. *Payne*, 337 F.3d at 770. A court must construe the record in the light most favorable to the nonmoving party and avoid "the temptation to decide which party's version of the facts is more likely true," as "summary judgment cannot be used to resolve swearing contests between litigants." *Id.* However, "a party opposing summary judgment may not rest on the pleadings, but must

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[1]Hypoglycemia, or "[a]n abnormally low plasma glucose level," is consistent with overconsumption of alcohol. *The Merck Manual of Diagnosis and Therapy* 180-82 (17th ed. 1999).

[2]Although Settles has moved to strike the coroner's report (*see* Docket # 40), he has not objected to Dr. Wagner's affidavit or the attached materials.

affirmatively demonstrate that there is a genuine issue of material fact for trial." *Id.* at 771.

Settles's wrongful-death negligence claim is barred by the doctrine of contributory negligence. As the Seventh Circuit has stated:

> Under Indiana law, a plaintiff guilty of contributory negligence, however slight, is completely foreclosed from recovery against public employees. Indiana courts find contributory negligence if (1) the plaintiff's conduct falls below the standard to which an ordinary person would conform for his or her own protection, and (2) the plaintiff's imprudent conduct is a direct cause of the injuries. Although ordinarily a question of fact for the jury, contributory negligence is an issue of law when the voluntary conduct of the plaintiff exposes him to "imminent and obvious dangers which a reasonable man exercising due care for his safety would have avoided."

Brownell v. Figel, 950 F.2d 1285, 1293-94 (7th Cir. 1991) (internal citations and footnote omitted).

Here, it is undisputed that Freeman consumed "toxic" levels of alcohol and painkillers on the day of his death, which certainly exposed him to "imminent and obvious dangers" which a reasonable man would have avoided. Reasonable men do not drink their way to a .378% blood-alcohol level.[3] Moreover, Freeman's conduct was plainly a "direct cause of [his] injuries" – he died of "acute alcohol toxicity" and a "toxic level of [painkillers]." Accordingly, the doctrine of contributory negligence can be applied here as a matter of law.

The upshot of *Brownell* is that a plaintiff seeking to recover from a public employee must be essentially blameless for his injuries, since even "slight" contributory negligence is a complete bar to his claim. 950 F.2d at 1293. No reasonable jury could find that a man who

[3]Contributory negligence can only be based on "voluntary" conduct, *Brownell*, 950 F.2d at 1294, and there is no direct evidence that Freeman voluntarily consumed the alcohol and painkillers found in his system. However, given Freeman's "long history of alcoholism" (Wagner Aff., Ex. 8B at 2) and an utter lack of evidence that Freeman was duped or forced into consumption, the only reasonable inference to be drawn is that Freeman's consumption was voluntary.

consumed deadly amounts of alcohol and painkillers was blameless when those same substances caused his death. Accordingly, the Court finds that Freeman was contributorily negligent as a matter of law, which completely forecloses Settles's wrongful-death claim against the Sheriff. *Id.* at 1293-94.

Settles's claim is doomed for a second reason: he failed to comply with the Indiana Tort Claims Act ("ITCA"), Ind. Code § 34-13-3-1 *et seq*. The ITCA bars tort claims against a political subdivision (such as the Sheriff in his official capacity) unless a notice of claim is timely filed with that subdivision. Ind. Code § 34-13-3-8. Here, Settles never filed a claim with the Sheriff; rather, he filed his claim with Allen County. It is well settled that a notice of claim to a county is not effective on that county's sheriff, as a sheriff is not a representative of the county. *Hupp v. Hill*, 576 N.E.2d 1320, 1326 (Ind. Ct. App. 1991) ("notice to the [County] Board [of Commissioners] of a claim against the . . . Sheriff is ineffective"); *cf. Weatherholt v. Spencer County*, 639 N.E.2d 354, 357 n.2 (Ind. Ct. App. 1994) ("the sheriff is not a representative of the county but he holds a separate office created by the Indiana Constitution"). Therefore, Settles's notice to Allen County did not satisfy the ITCA.

Settles protests that this result "exalts form over substance." (Pl.'s Br. in Opp'n at 11.) He notes that the Sheriff eventually received a copy of the notice of claim (a County employee apparently forwarded it to him), and he cites *Ammerman v. State*, 627 N.E.2d 836, 838-40 (Ind. Ct. App. 1994) for the proposition that the ITCA requires only "substantial compliance," not "strict compliance." Since the purpose of the ITCA is to inform a governmental entity of a claim against it and allow it to prepare a defense, *id.*, and since the Sheriff was in "actual receipt" of the notice of claim, Settles reasons that he has done enough to comply with the statute. But

Settles overlooks one crucial fact: the notice of claim which was forwarded to the Sheriff *did not identify the Sheriff as a potential defendant*.[4] (*See* Dep. of James Herman, Ex. 12.) Accordingly, it could not possibly have put the Sheriff on notice of a claim against him, and Settles's "substantial compliance" argument fails. Settles's claim is therefore barred by the ITCA. Ind. Code § 34-13-3-8.

In conclusion, because Settles's wrongful-death claim is barred by both the doctrine of contributory negligence and the ITCA, the Sheriff's motion for summary judgment (Docket # 30) is GRANTED as to that claim. Settles also has a motion to strike pending (Docket # 40), but as this opinion does not rely on the material he wishes to strike, his motion is DENIED as moot. The only issue that now remains for trial is Settles's official-capacity claim under § 1983 for violation of Freeman's Fourteenth Amendment rights.

Enter for this 15th day of December, 2004.

/S/ Roger B. Cosbey
Roger B. Cosbey,
United States Magistrate Judge

[4]The notice pertains only to Allen County and to "unknown" County employees; as noted above, the Sheriff is not a County employee.